80-722

No. .....

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1980

CANADIAN MOUNTAIN HOLIDAYS, LTD.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

WENDY PAIGE BUIST,
Real Party in Interest.

Petition for Writ of Certiorari to the California Court of Appeal First Appellate District

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QUESTION PRESENTED

Whether under the Due Process Clause of the Fourteenth Amendment a California court may assert in personam jurisdiction over a nonresident Canadian defendant on a cause of action arising in Canada where that defendant initiated no "minimum contact" in California relating to the cause of action and where that defendant's only business contacts with California were advertising and accepting in Canada reservations and deposits for Canadian ski resort accommodations.

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VS.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

WENDY PAIGE BUIST,
Real Party in Interest.

Petition for Writ of Certiorari to the Superior Court of California in and for the County of Alameda

---

The petitioner, Canadian Mountain Holidays, Ltd., respectfully prays that a writ of certiorari issue to review the order of the Superior Court of California in and for the County of Alameda entered in this proceeding on May 5, 1980.

OPINION BELOW

No opinion was rendered by the court below.

JURISDICTION

The order of the Superior Court of the State of California in and for the County of Alameda was entered on May 5, 1980. A timely petition for writ of mandate to review that order was summarily denied by the Court of Appeal of California, First Appellate District, on June 24, 1980. A timely petition for hearing in the Supreme Court of California was summarily denied on July 30, 1980, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure:

> Section 410.10 Jurisdiction Exercisable
>
> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States.

STATEMENT OF THE CASE

1. Summary of Material Facts.

Petitioner, Canadian Mountain Holidays, Ltd. (hereinafter "CMH") is a Canadian business headquartered in

Banff, Alberta, which provides "helicopter skiing" services to the public in the wilderness mountains of British Columbia, Canada. CMH's services are limited to providing guides, local helicopter transportation, food and lodging to skiers. Its business activities are limited geographically to the Rocky Mountain region of Canada, although its patrons travel to that location from all over the world. Its business is analogous to that of a localized resort.

CMH has no assets, offices, agents or business activities in the United States. Its "contacts" within the United States are limited to (1) limited advertising of its services in national magazines of general circulation, (2) distribution of informational brochures and films to persons requesting and (3) accepting reservations and deposits at its offices in Canada and related correspondence with patrons, directly or through nonexclusive travel agents.

Ian Buist, plaintiff's decedent spouse, was a California resident who had skied in prior years with CMH in Canada. On his own initiative (and not in response to any advertising or solicitation from CMH), he called a friend, Tom Gerrity, in Boston, Massachusetts and suggested that they reserve space in a subsequent CMH Canadian skiing excursion. Mr. Gerrity telephoned from Boston to CMH in Alberta on February 28, 1978, and requested a reservation for both men for a CMH program in January, 1979.

In response to Mr. Gerrity's request, CMH sent an application form and information to Mr. Buist in California. Mr. Buist returned his application form and subsequently sent his reservation deposit to CMH in Canada to hold his place in the group. He arranged his travel to Canada independently of CMH. All relevant "acts" of CMH occurred in Canada. No travel agents were involved in arranging Mr. Buist's accommodations with CMH.

Mr. Buist arrived for the CMH program at Cariboo Lodge in the Canadian Rocky Mountains, British Columbia, on January 20, 1979. While skiing alone nearby in the Canadian Rocky Mountains several days later, he fell into a "tree well" and died as a result of suffocation.

On January 22, 1980, Wendy Paige Buist, widow of Ian Buist, filed a wrongful death action against CMH in the Superior Court of California in and for the County of Alameda. She served the suit by mail upon CMH in Canada.

2. Presentation of Federal Question.

CMH appeared specially in the Superior Court of California in and for the County of Alameda and moved to quash service of process upon it for lack of in personam jurisdiction pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. CMH also moved the court to stay the action under forum non conveniens. Both motions were denied by the court on May 5, 1980 without a written opinion. CMH timely petitioned the California Court of Appeal, First Appellate District, for a writ of mandate to compel quashing of service, which petition was summarily denied without hearing on June 24, 1980. CMH timely petitioned to the California Supreme Court for a hearing, which petition was summarily denied on July 30, 1980.

3. Reason for Petition being Addressed to Superior Court of California.

This petition is addressed to the Superior Court of California in and for the County of Alameda because its order denying petitioner's motion to quash service of process is final and not reviewable by appeal or otherwise. Under California law, where a defendant moves unsuccessfully to quash service of process for lack of in personam jurisdic-

tion and then elects to defend the action on its merits, defendant's general appearance waives the right to have the jurisdictional matters reviewed on appeal. *McCorkle v. Los Angeles,* 70 Cal.2d 252, 256, 74 Cal.Rptr. 389, 449 P.2d 453 (1969).

The summary denials of the Court of Appeal of California and the Supreme Court of California to review the order of the Superior Court do not necessarily constitute decisions on the merits of this action. *McDonough v. Garrison,* 68 Cal.App.2d 318, 327, 156 P.2d 983 (1945). The order of the trial court constitutes a "final judgment" under California law which was rendered "by the highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. § 1257. *Grovey v. Townsend,* 295 U.S. 45, 47 (1935).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Other Courts as to the Proper Exercise of In Personam Jurisdiction over Nonresident Defendants Commercially Engaged in Providing Services Outside of the Forum State.

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Kulko v. Superior Court,* 436 U.S. 84, 91 (1978). A judgment rendered in violation of due process is void and unenforceable in the forum state and is not entitled to full faith and credit elsewhere. *Pennoyer v. Neff,* 95 U.S. 714, 732-33 (1878). CMH contends that its rights under the Due Process Clause have been violated because the respondent Superior Court lacks in personam jurisdiction over it under the "minimum contacts" test of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) and its progeny.

The federal due process standard is applicable to the California state courts. California Code of Civil Procedure section 410.10 provides that,

> "A Court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States."

See *Kulko v. Superior Court, supra,* at 89. Under the "minimum contacts" test a nonresident defendant's contacts with the forum state must be sufficient that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington, supra,* at 316, quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940).

The decision of the Superior Court, though lacking a formal written opinion, necessarily held that CMH had sufficient "minimum contacts" with California to enable California state courts constitutionally to assert jurisdiction over CMH. That conclusion is erroneous and in direct conflict with all established case law.

A. PETITIONER LACKED MINIMUM CONTACTS WITH CALIFORNIA THAT RELATE TO THIS ACTION.

The only "contacts" which CMH had with California relating in any way to the present cause of action were its accepting a reservation for the Canadian skiing activity through a phone call placed from Massachusetts to Banff, Alberta, and subsequently, its corresponding with plaintiff's decedent to secure in Canada his completed application and reservation deposit. Although CMH conducted limited advertising which reached California, plaintiff's decedent acknowledged in his application that he did not respond to any such promotional activity in making his reservation. [Exhibit C to Moving Papers].

The issue here is whether the unilateral activity of a California resident, in contacting a Canadian business to reserve recreational services at a Canadian location, reasonably may subject that Canadian business to personal jurisdiction in California in a cause of action arising in Canada.

This Court in *Kulko v. Superior Court, supra,* stated the rule applicable to this circumstance as follows:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State . . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum state . . ."

Id. at 436 U.S. 93-94, quoting *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). The same rule was applied to a products liability context in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), which followed *Kulko v. Superior Court, supra,* in holding that the unilateral act of a plaintiff's taking a product into a state would not create personal jurisdiction over the foreign defendant distributor there. *World-wide Volkswagen Corp. v. Woodson, supra,* at 295-98. *I*n the present case, the unilateral act of plaintiff's decedent in reserving resort services to be performed in Canada through an international telephone call does not create California jurisdiction over the Canadian business.

The nature of a recreational resort is that it must draw patrons from a wide geographical area while conducting its business at one location. It must accept and confirm reservations by mail or telephone to function, yet it would be wholly unreasonable to say that by doing so, it subjects itself to personal jurisdiction at every location from which

its patrons came. If that were a sufficient "contact" to support jurisdiction, there would be, by definition, no limit to jurisdiction over foreign resorts.

All reported decisions considering similar contacts have found an absence of jurisdiction over the foreign resort. See *Fordyce v. Round Hill Developments, Ltd.*, 585 F.2d 30 (2d Cir. 1978) (New York resident at Jamaica hotel); *Scheidt v. Young*, 389 F.2d 58 (3d Cir. 1968) (New Jersey resident at Pennsylvania resort); *Turner v. Jack Tar Grand Bahama, Ltd.*, 353 F.2d 954 (5th Cir. 1965) (Texas resident at Bahamas hotel); *MacInnes v. Fontainebleau Hotel Corp.*, 257 F.2d 832 (2d Cir. 1958) (New York resident at Florida hotel); *Kopolowitz v. Deepdene Hotel & Tennis Club*, 464 F.Supp. 677 (S.D.N.Y. 1979) (New York resident at Bermuda resort); *Sanders v. Wiltemp Corp.*, 465 F. Supp. 71 (S.D.N.Y. 1979) (New York resident at Pennsylvania resort); *Braasch v. Vail Associates, Inc.*, 370 F.Supp. 809 (N.D.Ill. 1973) (Illinois resident at Colorado ski resort); *Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 176 N.Y. Supp.2d 318 (1958) (New York resident at Florida hotel). Courts also have held that interstate correspondence and telephone communication relating to a transaction are an insufficient "minimum contact" where the relevant services are performed elsewhere. *Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 454-55 (8th Cir. 1977); *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723, 729-30 (5th Cir. 1973); *Wright v. Yackley*, 459 F.2d 287 (9th Cir. 1972). The "contacts" present here reasonably cannot subject a Canadian resort to jurisdiction in California.

Even if minimum contacts were established, considerations of "fair play and substantial justice" still would mitigate against jurisdiction here. See *Kulko v. Superior*

Court, supra, 346 U.S. at 92-93. California has no interest in regulating Canadian skiing. Canadian tort law should apply in any trial. There is no possibility of multiple litigation. Nearly all discovery will have to be conducted in Canada. The British Columbia courts at Victoria are within easy geographical reach of a plaintiff residing in Northern California. No relevant factor would support the exercise of jurisdiction in California.

B. A CANADIAN DEFENDANT'S LIMITED ADVERTISING IN THE UNITED STATES AND ACCEPTANCE OF ACCOMMODATION RESERVATIONS AND DEPOSITS IN CANADA CANNOT CREATE IN PERSONAM JURISDICTION OVER IT IN CALIFORNIA UNDER THE "SUBSTANTIAL BUSINESS" TEST.

Where jurisdiction fails under the "minimum contacts" test, it may be based only upon the defendant's "systematic, continuous and extensive" conduct of unrelated business within the forum, to an extent that it would be reasonable to consider the defendant a resident of the state for purposes of any cause of action. *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 448 (1952); See 2 *Moore's Federal Practice,* section 4.25[5].

CMH's total contacts within California, consisting of advertising in national magazines of general circulation, distribution of informational brochures, occasional appearances at ski shows and acceptance in Canada of accommodations reservations and deposits from individuals and nonexclusive travel agents, do not *approach* the standards of "substantial business activity." See *Green v. Chicago, Burlington and Quincy Ry. Co.,* 205 U.S. 530 (1907); *Ratliff v. Cooper Laboratories, Inc.,* 444 F.2d 745 (4th Cir. 1971); *Seymour v. Parke, Davis and Co.,* 423 F.2d 584 (1st Cir. 1970); *Scheidt v. Young, supra,* (3rd Cir. 1968); *Turner v. Jack Tar Grand Bahama, Ltd. supra,* (5th Cir. 1965); *L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc.,*

265 F.2d 768 (9th Cir. 1959); *MacInnes v. Fontainebleau Hotel Corp., supra,* (2nd Cir. 1958); *Braasch v. Vail Associates, supra,* (N.D.Ill. 1973); *Fisher Governor Co. v. Superior Court of California,* 53 Cal.2d 222, 1 Cal.Rptr. 1, 347 P.2d 1 (1959). The principle was stated well in *Fisher Governor v. Superior Court of California, supra,* at 225:

> "Although a foreign corporation may have sufficient contacts with a state to justify an assumption of jurisdiction over it to enforce causes of action having no relation to its activities in the state [citations], more contacts are required for the assumption of such extensive jurisdiction than sales and sales promotion within a state by nonexclusive sales representatives [citations]." *Id.*

It was unreasonable to base jurisdiction here upon such activities where the universally-recognized rule is that they do not create in personam jurisdiction over a foreign business.

2. The Decision Below Raises Significant Recurring Issues which Necessitate Clarification By This Court.

The problem of defining what contacts with a state may support the exercise of personal jurisdiction has been addressed in several recent Supreme Court opinions. None of those opinions, however, has addressed the issue as it relates to interstate communications initiated to procure *services* outside of the forum state. The present case also does not involve any unusual jurisdictional statute or regulated industry which were major factors in this Court's decision in *McGee v. International Life Insurance Co.,* 355 U.S. 220 (1957).

In *Kulko v. Superior Court, supra,* this Court held that, in a purely personal transaction involving child support, the unilateral acts of the plaintiff in California could not

compel her former husband, a New York resident, to defend himself in California. In its opinion, however, this Court repeatedly stated that Mr. Kulko's circumstance was not commercial, and it left open the issue with respect to commercial contacts.

In *World-Wide Volkswagen Corp. v. Woodson, supra,* this Court reaffirmed *Kulko v. Superior Court* in the context of products liability, holding that the unilateral act of driving an automobile into a state would not create jurisdiction over the nonresident automobile distributor in a suit arising from an accident occurring within the forum. The Court stressed that the critical issue in such cases is whether the nonresident defendant "delivers its products into the stream of commerce . . . of the forum state." *Id.,* at 297-98, citing *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961).

This Court has not defined a standard for jurisdiction in commercial transactions outside of the products liability context, particularly those which relate to services performed outside of the forum state, where there is no analogous "stream of commerce" to consider. Such cases directly confront the issue of how much interstate communication relevant to a transaction is necessary to meet the standard of due process for the assertion of jurisdiction over a foreign business. Neither of this Court's other recent decisions, *Rush v. Savchuk,* 444 U.S. 320 (1980), nor *Shaffer v. Heitner,* 433 U.S. 186 (1977), provide any further guidance beyond general reaffirmation of the principles of "reasonableness," "fairness" and "substantial justice" enunciated in *International Shoe.*

This petition presents the opportunity for this Court to state clearly what does and does not constitute a sufficient minimum contact to support jurisdiction in an interstate

business context. Given the immense numbers of such transactions which occur daily and the proliferation of lawsuits related to such dealings, a clarification of the issue is essential through a hearing of the issues presented by this petition.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Superior Court of California.

Respectfully submitted,

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